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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,790

IN RE THE MATTER OF Appointment of Conservator for
AGNES M. DRISCOLL
Dawn Hamilton, Removed Conservator, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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1. The District Court erred and abused its discretion in denying James Hamilton's motion to transfer the case to the non-jury calendar.

2. The District Court erred and abused its discretion in removing James Hamilton as Conservator for Agnes M. Driscoll without hearing testimony from James Hamilton and in asking for testimony from only one witness - Otto Meyer, who sought James Hamilton's removal.

3. The District Court erred and abused its discretion in granting James Hamilton's motion to respond to the Guardian Ad Litem's Supplemental Report relating to medical opinion and thereafter removing James Hamilton as Conservator for Agnes M. Driscoll prior to the expiration of the time granted to James Hamilton within which to present such response.

(This case has not previously been before the United States Court of Appeals for the District of Columbia Circuit)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,790

IN RE THE MATTER OF

AGNES M. DRISCOLL

BRIEF FOR APPELLANT

REFERENCE TO RULINGS

The Order of the District Court appealed from, an Order removing James Hamilton as Conservator of the Estate and Person of Agnes M. Driscoll, dated October 21, 1969, appears at Page 62 of the Appendix.

STATEMENT OF THE CASE

Statutes relating to the appointment, powers and discharge of Conservators appear at Section 21-1501 through Section 21-1507, District of Columbia Code.

James Hamilton, the nephew of Agnes M. Driscoll, was removed by the District Court on October 21, 1969, as Conservator of the Estate and Person of Agnes M. Driscoll (App. 62). This Order followed the filing on July 22, 1969, of a Petition for the Removal of James Hamilton by Otto Meyer, a brother of Agnes M. Driscoll (App. 2, 13).

James Hamilton, the nephew, had been appointed as Conservator for Agnes M. Driscoll April 10, 1969 (App. 1).

Otto Meyer, the brother, did not contest the original appointment of James Hamilton although he had notice of the date of the hearing (App. 1). He later claimed he was misled in a telephone conversation with the wife of James Hamilton (App. 16-17), which allegation was denied by the wife (App. 41).

The heirs-at-law and next-of-kin of Agnes M. Driscoll, who is 80 years old, are the following (App. 13-15):

1. Margaret M. Hamilton, sister, the mother of James Hamilton, Fairfax, Virginia
2. Otto Meyer, brother, Little Silver, New Jersey
3. Mary Meyer Mellott, sister, Columbus, Ohio
4. Children of George Meyer, deceased brother:
   a. George Meyer, Jr., Oak Hill, Ohio
   b. Mary Margaret Cleary, University Heights, Ohio
5. Children of Lucy M. Grier, deceased sister:
   a. Alexander Grier, Monroe, New York
   b. Lucy Grier Johnson, Bloomfield Hills, Michigan

In March, 1969, Margaret Hamilton suffered a stroke. At the time of the stroke, Margaret Hamilton and Agnes M. Driscoll had been living together for many years (App. 39). Following the stroke to Margaret Hamilton, Agnes Driscoll began to exhibit serious signs of senility (App. 40). Accordingly in March, 1969, James Hamilton and

Otto Meyer had a conversation about "what we should do with Agnes" in the words of Otto Meyer (Dep. of Otto Meyer, page 7, Original record). At that time, in the words of Otto Meyer: "Well, I told Jimmie - this is Mr. Hamilton - you live here and know the situation better than I, and I am located over two hundred miles away, it would be quite difficult for me to come down here and make arrangements for her to stay at the apartment and have someone with her." (Dep. of Otto Meyer, page 8, Original record) Further, "I told him, 'Jimmie, if you want to go ahead and take the conservatorship, okay'." (Dep. of Otto Meyer, page 8, Original record)

James Hamilton was appointed Conservator for both his aunt Agnes M. Driscoll and his mother Margaret Hamilton on April 10, 1969, following a hearing before Judge McGuire in the District Court. Both women were subsequently removed by James Hamilton with Court approval to the Fairfax Nursing Home, Fairfax, Virginia, and both now reside there. (App. 40 and C.A. No. 695-69, In re the matter of Margaret Hamilton)

James Hamilton's prior counsel, who handled his petitions for appointment as Conservator, called Otto Meyer on June 17, 1969, and the following transpired in the words of Otto Meyer (Dep. Otto Meyer, page 9, Original record): "I had been called by Mr. Hamilton's attorney at that time . . . who wanted to know if I knew anything about the accounts of Mrs. Driscoll. I told him I learned of one account when I was down here last on the 10th of March that

was for approximately $120,000, and that Agnes Driscoll's name, Margaret Hamilton's name, and Mary Mellott's name were on. And that was the only account I knew about . . . He (Mr. Hamilton's prior counsel) said there was another account, and I knew nothing about it."

Following the filing of the Petition for Removal by Otto Meyer on July 22, 1969, this case, in essence, became a dispute between relatives living in the Washington area and the relatives living outside the Washington area represented by Otto Meyer.

Otto Meyer in his Petition alleged conflict of interest, insufficiency of bond (the bond was made fully adequate prior to the hearing) and inadequate notice. The only charge which need concern us here is that of alleged conflict of interest.

These alleged conflicts were the following (App. 19-25):

1. A joint stock account, Agnes Driscoll and James Hamilton, joint tenants ($139,990.20, with Ferris and Co., D.C.).

2. A bank account in the National Bank of Washington in the names of Agnes M. Driscoll, Mary R. Meyer (Mellott) or Margaret M. Hamilton, joint tenants ($132,127.83).

3. United States Savings Bonds in the names of Agnes M. Driscoll and Margaret Hamilton ($2,080.80).

4. A gift of $3,000 to Margaret M. Hamilton on March 4, 1969, reported in the 60-Day Report.

5. That real property had been given (in 1966 and 1967) to James Hamilton and Nancy Hamilton by Agnes Driscoll.

Otto Meyer also attached a copy of Agnes M. Driscoll's purported will dated June 9, 1965, to the Petition (App. 26-27) for the purpose

of showing that the Guardian Ad Litem had erred in stating that "James Hamilton is the chief beneficiary of the last known will and testament of his aunt, Mrs. Driscoll." The real property in the will had been transferred to James Hamilton subsequent to the making of the will and the will, if valid, could only serve to nominate an executor, James Hamilton (App. 22).

Otto Meyer also asked that the First National Bank of Washington be named Conservator for Agnes M. Driscoll, a bank in which Otto Meyer's counsel's father was a director. This was not disclosed by Otto Meyer's counsel to James Hamilton's counsel until two days before the hearing in the District Court on the removal (App. 92).

In reply to the above allegations of conflict of interest James Hamilton pointed out he was fully bonded (App. 5), had been charged with no wrongdoing(Dep. of Otto Meyer, page 24, Original record), was the logical Conservator since he had been extremely close to his Aunt and had lived with her for many years (App. 39-40), the interests of the ward were paramount, and that until such time as he violated his duties in some respect he should not be removed. Also, that Judge McGuire was completely informed as to the joint accounts when James Hamilton was appointed (App. 81-82). Judge McGuire did not know about the land transfers in 1966 and 1967 but there is no requirement that gifts made more than a year prior to the Conservatorship application be disclosed (60-Day Report Form under Rule 22, filed June 25, 1969, Original record; App. 2). Further, with respect to the land transfers, Otto Meyer had filed two suits in the state of Virginia challenging the transfers on the ground of undue influence (App. 83).

James Hamilton supported the right of Otto Meyer to make these allegations in the Virginia Courts (App. 84) and had readily waived certain jurisdiction requirements so the suits could be heard.

In addition James Hamilton and his wife readily consented to have their depositions taken. James Hamilton pointed out that the income from the estate was at least $22,000 including two pensions and that the questioned accounts were not needed and should be "frozen" by the Court (App. 41).

On September 22, 1969, James Hamilton moved the Court to set the Petition of Otto Meyer for hearing on the civil non-jury calendar and for taking oral testimony on the Petition (App. 42). This Motion came on for special hearing before the District Court on September 29, 1969 (App. 66). The following colloquy occurred (App. 67):

* * *

Mr. Robbins: "Every authority I have been able to find, Your Honor, indicates that a hearing is in order in a case where there is an attempt to remove a Guardian or Conservator, and I cite Brosnan v. Brosnan ..."

The Court: "Counsel, I will save you a lot of time. Over the weekend I read the complete file of the case and know what the case is all about."

* * * (App. 70)

Mr. Robbins: "Your Honor, I was going on authorities which I can cite. The only other case . ."

The Court: "I read the authorities. I am not convinced you are right. I have decided the matter and will hear the case at 1:45 on the afternoon the motion is set for trial . . ." (The following Thursday)

* * *

The Petition of Otto Meyer was heard on the Motions Calendar on October 2, 1969, following the denial of the Motion to Place on the Non-jury Calendar (App. 72-95).

A Supplemental Report was filed immediately prior to the Motions Calendar hearing on September 30, 1969, by the Guardian Ad Litem, John Treanor, Jr. (App. 47). Counsel for James Hamilton did not receive a copy of this report until late October 1, 1969, - the day before the Motions Calendar hearing. James Hamilton did not have a chance to read this report until immediately before the Motions Calendar hearing (App. 61).

Following the proceedings on October 2, 1969, during which the only witness heard by the Court was Otto Meyer who sought James Hamilton's removal, the District Court took the matter under advisement.

Thereafter on October 6, 1969, James Hamilton filed a motion for leave to respond to statements of reported medical opinion regarding Agnes M. Driscoll as understood by the Guardian Ad Litem (App. 61). These statements were made in the aforesaid Supplemental Report.

Thereafter on October 16, 1969, the Court granted James Hamilton's Motion to make such response within ten (10) days or to and including October 27, 1969 (App. 65).

However, prior to expiration of the time granted James Hamilton within which to present such response, the Court on October 21, 1969, removed James Hamilton as Conservator (App. 62) and appointed Herbert J. Miller, Jr., Esquire, as Successor Conservator (App. 64). James Hamilton was ordered to turn over to the Successor Conservator, inter alia, all assets . . . including all bankbooks and passbooks . . . scheduled in the 60-Day Report . . ."

ARGUMENT

1. The District Court erred and abused its discretion in denying James Hamilton's motion to transfer the case to the non-jury Calendar.

In Brosnan v. Brosnan, 53 App. D.C. 149, 289 Fed 547 (1923), the Court said ". . . the administrator . . . is entitled to his day in Court - in other words, to a trial upon the evidence . . . and at such trial the petition is to be regarded as a pleading only, not as evidence. Then, citing In re estate of Patten, 18 D.C. 400, the Court said: "The position of an executor is a valuable office, from which he should not be deposed without the opportunity of defense . . . Indeed, there is nothing more firmly imbedded in our

jurisprudence, constitution and laws, than the principle that a man is not to be condemned without a hearing, nor to be deprived of his property rights without having been first afforded an opportunity of defending himself in the Courts." Brosnan v. Brosnan was cited to the Court in the reply of James Hamilton filed September 26, 1969 (App. 6).

The general rule with respect to personal representatives is stated in 47 ALR 2d 316, with numerous citations, as follows: "While pleadings may be sufficient to raise an issue, it is still necessary, for that issue to be decided, that some evidence be introduced. Thus it has been quite uniformly held that the mere appearance of a personal representative at a hearing designed to effect his removal constitutes no waiver of his right to a day in Court, meaning by this that the personal representative is entitled to an opportunity to produce evidence to rebut the specific charges relied upon to effect such removal."

In line with these cases was the District Court's handling of In re the Matter of George P. Marshall, No. 2979-63, also concerning a Conservator, cited to the Court (App. 43) by James Hamilton. See order filed February 17, 1964. See also Bramhall et al. v. Brosnan, 55 App. D.C. 309, 5 F. 2d 270 (1925) where this Court upheld the District Court's action in removing an Administrator after a trial (See page 310) had been held.

In Price v. Williams, 129 App. D.C. 239, 393 F. 2d 348 (1968),

this Court stated: "If the ward's relatives or creditors could always institute proceedings to remove a conservator and use discovery to prepare for a formal hearing on the merits, the efficiency of the conservator's administration of the ward's estate might be greatly reduced and its expense greatly increased." This clearly implies that where the Conservator appointed by the Court is attacked by relatives, the Court need not give a hearing to the relatives if it deems their claim meritless. There is nothing in this opinion, however, which negates the Court's duty to grant a trial where it is determined that the charges are serious and it is proposed to remove the Conservator. It will be remembered that James Hamilton was fully bonded, he was charged with no wrongdoing and the District Court which appointed him was apprised of all the alleged conflicts of interest with the exception of the land transfers in 1966 and 1967 prior to the appointment of James Hamilton in 1969 and, with respect to those, there is no requirement that they be disclosed to the Court. Further, the applicable form makes no provision for such disclosure and Otto Meyer has full rights to allege undue influence in the Virginia Courts if he so desires, rights which he is presently exercising.

2. The District Court erred and abused its discretion in removing James Hamilton as Conservator for Agnes M. Driscoll without hearing testimony from James Hamilton and in asking testimony from only one witness - Otto Meyer, who sought James Hamilton's removal.

The failure of the District Court to hold an evidentiary hearing on the removal of James Hamilton left the Court without a basis for its decision. The best interests of the Ward should always be the first concern of the Court. Even if a conflict of interest exists it is not necessarily fatal. In Price v. Williams, there are obvious conflicts, but the Conservators were not removed. Perhaps the Court in Price was influenced by the fact (page 241) that the Ward had asked the Conservators to be appointed. Did Agnes Driscoll ask that James Hamilton be appointed? No inquiry was made, but numerous friends and James Hamilton will testify if given the chance that Agnes Driscoll wanted James Hamilton to "have everything" and this had been her position for years. What is the real medical condition of Agnes Driscoll? The Court will never know because no testimony under oath, with the protections of a trial, was adduced. The most controversial statements were made by the Guardian Ad Litem immediately before the hearing without any opportunity for James Hamilton to reply.

The law is by no means clear that James Hamilton should have been removed. See, for example, Morgan v. Morgan, 156 N.C. 169, 72 S.E. 206 (1911) where an interest in personalty with an intestate was claimed as ground for removal:

> "In the absence of bad faith by an administrator, a mere claim by a distributee that intestate owned a half interest in personalty in the administrator's possession was not ground for the administrator's removal, where the value of such property had been ascertained and evidence thereof

preserved, and the administrator had given a solvent bond sufficient to cover the value of intestate's property . . ."

It is submitted that cases which may be cited by Otto Meyer where fiduciaries have violated their duties, have no application until a violation occurs. James Hamilton has violated no duties.

3. The District Court erred and abused its discretion in granting James Hamilton's motion to respond to the Guardian Ad Litem's Supplemental Report relating to medical opinion and thereafter removing James Hamilton as Conservator for Agnes M. Driscoll prior to the expiration of the time granted to James Hamilton within which to present such response.

The Guardian Ad Litem's Supplemental Report was filed on September 30, 1969, two days before the scheduled hearing in Motions Court, and was not received by counsel for James Hamilton until the night before the hearing and was not read by James Hamilton until immediately before the hearing (App. 61).

Numerous statements were made by the Guardian Ad Litem which were extremely damaging to Mr. Hamilton and also incorrect, such as that James Hamilton's former counsel did not know of the realty transfers. Moreover, he gave credence to a letter which had been made available to him by Mr. Hamilton's previous counsel by a Dr. Kneipp relating to the medical condition of Mrs. Driscoll in 1966 (App. 49). The Letter had been written in 1968 and was prepared in connection with litigation over a land sale Mrs. Driscoll sought to avoid. The letter was "out of Court, not under oath, not subject to cross-

examination" and related to another legal proceeding. It should not have been given any credence. Worst of all, the Guardian Ad Litem made statements of medical opinion regarding Agnes Driscoll following an interview with a Dr. Joseph T. Nichols (App. 51) at the Fairfax Nursing Home. He stated that Mrs. Driscoll was "badly deranged," "attacked other patients" and "it could make no difference to the lady who is handling her affairs" (App. 51). All these contentions are vehemently denied by James Hamilton but he had no chance to reply to them.

James Hamilton filed a motion on October 6, 1969, for leave to reply to the Guardian Ad Litem's Supplemental Report (App. 61). This motion was granted by order dated October 16, 1969 (Filed October 30, 1969), allowing James Hamilton ten (10) days or to and including October 27, 1969, within which to make such response (App. 65). However, James Hamilton was removed as Conservator on October 21, 1969, and the order allowing response became moot.

It is respectfully submitted that the Court erred and abused its discretion in not permitting the response it had authorized by Order dated October 16, 1969.

CONCLUSION

Conservators in the District of Columbia face a precarious future if they may be summarily removed by hearing on the motions calendar. The rule of Brosnan v. Brosnan should be reaffirmed and

clearly made applicable to the removal of Conservators.

The Motions Calendar hearing at which James Hamilton was not given an opportunity to testify should be held fatally defective to his removal.

The failure to give James Hamilton an opportunity to reply to the Guardian Ad Litem's Supplemental Report, after allowing such reply by written order, should vitiate the removal.

An Appellate Court may consider matters of which it can take judicial notice, even though they are not in the record. 4A C.J.S. Appeal and Error Sec. 1212. The Court may wish to note that following the Order of October 21, 1969 (App. 62) ordering a transfer of all the assets, the Successor Conservator had all the joint accounts placed in his own name as Conservator. James Hamilton thereupon filed a motion for clarifying Judge Sirica's Order to the extent of stating how the joint accounts (in whose name) should be held (App. 96). Judge Sirica refused to clarify his order: "I am not going to hear these matters, so you will have to have it put on the motions card and have it brought up on some day convenient to the parties." James Hamilton thereupon filed a motion for instructions which duly came up before Judge Jones. Judge Jones likewise refused to afford any relief stating that a full trial was called for. See 62 ALR 2d 1093.

The unfairness in all this is manifest. James Hamilton was deprived of his Conservatorship without a hearing. This deprivation

was compounded by a deprivation of his property, his in praesenti right to survivorship in the account and his money (it is not disputed that James Hamilton contributed more than $4000 (App. 39) to the joint stock account) in the account, again without a hearing. If nothing else, the Fifth Amendment to the Constitution of the United States with respect to deprivation of property without due process is applicable, not only with respect to James Hamilton but also with respect to other joint tenants. Protection could easily have been accomplished by ordering the joint accounts "frozen" to be used only for the support of the ward if necessary.

Respectfully submitted,

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BRIEF OF APPELLEE HERBERT J. MILLER, JR.

IN THE

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FOR AGNES M. DRISCOLL

JAMES HAMILTON, REMOVED CONSERVATOR,

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

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Dated: May 20, 1970

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STATEMENT OF ISSUE

Your Appellee, Herbert J. Miller, Jr., Successor Conservator of Agnes M. Driscoll, will address himself principally to the issue of whether the proceeding conducted by Judge Sirica in the United States District Court for the District of Columbia that resulted in the order removing Appellant James Hamilton as Conservator was sufficient as a matter of law.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE HERBERT J. MILLER, JR.

STATEMENT OF THE CASE

A. Reference to Rulings

The Order of the District Court Appellant is appealing is found at pages 62-63 of the Appendix filed in this case.

B. Nature of Case and Course of Proceeding

Your Appellee adopts by reference the statement of the Nature of the Case and Course of Proceeding contained at pages

2-5 of the Brief of Appellee Otto Meyer, filed in this case.

C. Statement of the Facts

Your Appellee adopts by reference the Statement of the Facts contained at pages 5-10 of the Brief of Appellee, Otto Meyer, filed in this case.

SUMMARY OF ARGUMENT

Appellant's contention that he was removed as Conservator of the Estate of Agnes M. Driscoll without a hearing is erroneous. The record is clear that Appellant's removal was effectuated only after he had been given a hearing that was sufficient to meet any due process requirements if they be required in the removal of a conservator. Appellant Hamilton and his counsel were duly notified that a hearing would be conducted on October 2, 1969, by Judge Sirica on Appellee's petition for removal. At this hearing they were afforded an opportunity to produce witnesses and elicit testimony and they had an opportunity to cross-examine the witness called by the Court or any other party. It was only after the District Court gave Appellant an opportunity to be heard and considered the undisputed facts and admissions in Appellant's answer and response to the petition for removal and deposition and the other evidence before it that it entered an order of removal.

In ordering Appellant's removal the District Court properly followed the standard approved by this Court in Price v.

Williams, 129 U.S.App.D.C. 239, 393 F.2d 348 (1968), for removal of a conservator, namely, that a conservator whose interests conflict with the interests of his beneficiary should be removed. In its application of the standard to the instant case the District Court did not abuse its discretion for the reason that the Court's order was based on undisputed evidence that the Appellant and his mother, Margaret M. Hamilton, by way of gift and joint ownership, had acquired, without any consideration, either sole or joint ownership in assets of the ward Agnes M. Driscoll valued in excess of $500,000. Appellant's personal interest as an individual and as Conservator of the estate of his mother in the gifts and joint accounts was manifestly antagonistic to the duty of the Conservator of Agnes M. Driscoll to protect to the fullest the legal rights of his ward.

Pointing up the adverse interests of the Appellant and the ward Agnes M. Driscoll is Appellant's contention that he was deprived of a full hearing because the Court didn't give him the opportunity to show that the ward Agnes M. Driscoll intended to give him everything and his claim of an *in presenti* gift by the ward to himself and to his mother by the establishment of joint bank and brokerage accounts. Such claims by Appellant on his own behalf and as Conservator of his mother, Margaret M. Hamilton, are in conflict with the interests of the ward that her Conservator

is obligated to preserve and protect. The gravity of Appellant's conflict of interest is pointed up by the decisions of this Court that where a joint depositor creates a joint account for himself and another without consideration it is presumed to have been done for the convenience of the depositor. With such undisputed evidence before it of real and substantial conflicts of interest it cannot be reasonably argued that the District Court abused its discretion in removing Appellant as Conservator of the estate of Agnes M. Driscoll.

ARGUMENT

I. THE DISTRICT COURT AFFORDED APPELLANT A HEARING THAT WAS SUFFICIENT AS A MATTER OF LAW AND APPLIED A PROPER STANDARD OF CONFLICT OF INTEREST FOR REMOVAL OF A CONSERVATOR

Relying on decisions of this Court such as Brosnan v. Brosnan, 53 U.S.App.D.C. 149, 289 Fed. 547 (1923), holding that executors and administrators may only be removed for cause after a hearing, Appellant's major contention is that as a Conservator he was in the same position as an executor and the District Court erred in removing him as Conservator without a hearing. Leaving aside for the moment the applicability of the Brosnan decision to conservators, there is a basic weakness in Appellant's contention and that is he was not removed without a hearing. The record is quite clear that on October 2, 1969, after due notice

to the parties, the District Court held a hearing on the petition for removal. At this hearing the Appellant was specifically given the opportunity to call witnesses or introduce whatever other evidence he had. Appellant's failure to take advantage of this opportunity does not negate the fact that the District Court did hold a hearing on the petition for removal.

What Appellant's complaint boils down to is not that he was denied a hearing, but that the District Court denied his motion to set the petition for removal on the Civil Non-Jury Trial Calendar and proceeded to hold a hearing on the removal petition while sitting as a motions judge. Even if the law requires a hearing prior to removal of a conservator it was met by the District Court's hearing on October 2, 1969. So long as a hearing is granted, whether it be through the vehicle of a motion or the non-jury calendar, it would appear that any due process requirement of a hearing has been met.

Appellant's contention that the District Court deprived him of a full hearing rests in a large part on Appellant's lack of understanding of the standard to be applied by the District Court in removing a conservator. It appears to be Appellant's position that a conservator may only be removed for a breach of his fiduciary duties and that a conflict of interest is not a sufficient ground for removal (Appellee's Brief, pages 10-12).

Appellant's authorities for this position are again Brosnan, supra, and other executor-administrator cases. Irrespective of the question of what is the standard Brosnan, supra, establishes for executors and administrators it is quite clear that insofar as a conservator is concerned this Court has held that a conservator may be removed for a conflict of interest. In a recent 1968 decision, Price v. Williams, supra, this Court specifically held that a conservator must conform to a high standard of conduct, and a conservator whose interests conflict with those of his beneficiary should be removed. It is this conflict of interest standard that the District Court applied in the instant case.

Appellant's contention that the District Court deprived him of a full hearing is based on another erroneous assumption and that is that a fiduciary may never be removed except after a full blown trial. This is not so. Even in the removal of executor cases, a hearing is only necessary where there are disputed issues of material fact. Thus, in Brosnan, supra, it was because of disputed material facts that this Court required a hearing. Where a Court has before it a petition for removal and by way of answer and deposition admissions by the fiduciary admitting the material

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1/ In his anaylsis of this Court's decisions, the Appellee had quite correctly and persuasively pointed out that there appears to be two standards as to proceedings required to remove fiduciaries - one for Executors and Administrators and one for collectors. It is this collector standard that applies to other fiduciaries including guardians and conservators (Appellee's Brief, pages 13-16).

averments warranting removal, the Court may order the fiduciary's removal without any further proceeding. Miller's Estate, 264 Pa. 310, 107 Atl. 684 (1919). In the instant case Appellant admitted to real and substantial conflicts of interest. In claiming he was deprived of a full hearing Appellant fails to come to grips with the real issue and that is did the District Court abuse its discretion in removing Appellant as Conservator because of conflict of interests between the ward Agnes M. Driscoll and Appellant as an individual and as Conservator of the estate of his mother, Margaret M. Hamilton?

II. THE ORDER OF REMOVAL IS BASED ON UNDISPUTED EVIDENCE OF A CONFLICT BETWEEN THE INTERESTS OF THE WARD AND THE INTERESTS OF APPELLANT AS AN INDIVIDUAL AND AS CONSERVATOR OF THE ESTATE OF HIS MOTHER

In basing Appellant's removal on a conflict of interest the Court had before it undisputed evidence of conflict of interests. The nature of the conflict was that the Conservator of Agnes M. Driscoll is a fiduciary charged with the duty of protecting to the fullest the legal rights of his ward. It was his duty to collect all assets of the ward and to reduce to possession all monies, debts and obligations of his ward. Yet, the undisputed evidence before the District Court was that without any consideration the ward had established a joint stock account with Appellant in the amount of $140,000; that without any consideration the ward had

established a joint bank account with the Appellant's mother in the amount of $132,000; that without any consideration the ward had just a few days before being declared incompetent made substantial gifts of money to her sister, Margaret M. Hamilton, and to others; and that the ward, without any consideration, had transferred five parcels of real estate valued at approximately $250,000 to the Appellant. In summary, the undisputed evidence was that Appellant and his mother, by way of gift of joint ownership, had acquired either sole or joint ownership in assets of the ward valued in excess of $500,000. It seems self-evident that Appellant's personal interest as an individual and as Conservator of his mother in the gifts and joint accounts conflict with his duty to his ward to protect to the fullest the legal rights of the ward.

Despite the obvious antagonistic interests between the ward and the Appellant, the Appellant argues that he was deprived of a full hearing - that the Court didn't give Appellant an opportunity to show that Agnes M. Driscoll intended Appellant to get everything; that Agnes M. Driscoll created "the joint Ferris Account" with her nephew and transferred land to her nephew, James Hamilton, because she wanted him to have absolute title; that the District Court did not give Appellant adequate opportunity to advance evidence to rebut a portion of the Guardian Ad Litem's statements on the ward's mental competency (Appellant's Brief

pages 9-10 and Reply Brief pages 10-11). Such statements by Appellant show a total lack of understanding of the conflict of interest and the basis of the District Court's ruling. The question before the District Court was not whether the ward intended to make Appellant a joint owner in the Ferris account or whether the gifts of money and property were valid. The question before the District Court was whether the Appellant's interests were antagonistic to those of his ward. The answer was obviously "yes". Appellant and his mother claimed interests in real and personal property that Agnes M. Driscoll's Conservator was required to investigate and make a determination as to whether the property should be considered as assets of the ward, Agnes M. Driscoll. The District Court properly concluded that because of his adverse claims to the property, Appellant was hardly the person to conduct such an investigation or make such a determination.

The joint bank and stock accounts highlight Appellant's conflict of interest with his ward. Appellant has claimed on his own behalf an <u>in presenti</u> interest in the Ferris & Company brokerage account held as a joint tenant with his ward and on his mother's behalf an <u>in presenti</u> interest in the National Bank of Washington bank deposit held in the joint names of Margaret M. Hamilton, her sister Mary R. Meyer (Mellot) and the ward, Agnes M. Driscoll (Appellant's Deposition, page 53, Response, Third Defense ¶10,

11 A-C; App. 37, 38; Brief pages 14-15). Appellant's claim of in presenti interests is nothing less than a claim that at the time the joint accounts were created Agnes M. Driscoll intended to make a present gift of her interest to Appellant in the brokerage account and to Margaret M. Hamilton and Mary R. Meyer (Mellot) in the bank account. In making such claim Appellant has taken a position antagonistic to the interests of the ward and markedly so in view of this Court's holdings on joint accounts. This Court has repeatedly held that where a depositor creates a joint account for himself and another, without consideration, it is presumed to have been done for the convenience of the depositor. Under these decisions the presumption casts upon the non-contributing joint tenant the burden of showing that the depositor intended to make a present gift. Harrington v. Emmerman, 88 U.S.App.D.C. 23, 186 F.2d 757 (1950); Murray v. Gadson, 91 U.S.App.D.C. 38, 197 F.2d 194 (1952); Thompson v. Thompson, 100 U.S.App.D.C. 285, 244 F.2d 374 (1957); Imirie v. Imirie, 100 U.S.App.D.C. 371, 246 F.2d 652 (1957). In light of the decisions of this Court on joint accounts and the right of survivorship, it is apparent that Appellant's claims conflict with the interests of the ward Agnes M. Driscoll.

Appellant attempts to excuse the conflict of interests between his ward and himself and his mother as to the joint brokerage account and as to the joint bank accounts, by stating

that as Conservator of Agnes M. Driscoll he would not use the joint accounts for any purpose except for the support of Agnes M. Driscoll, if necessary, and then only with the approval of the Court. Accordingly, Appellant reasons that the accounts are "frozen" and no conflict exists. Such an explanation makes little sense under the decisions in this Circuit. Either the ward Agnes M. Driscoll owned the account or interest in it or she did not. If she owned the account or an interest in it she was entitled to immediate enjoyment of the account. The same is true of the other joint owner. If the account was not a convenience account and Agnes M. Driscoll intended to make a gift of an individual one-half interest at the time it was established, then Appellant or his mother owns such an interest and is entitled to immediate enjoyment of such interest. See Harrington v. Emmerman, supra, at page 26. The point of this is that Agnes M. Driscoll's Conservator must make a determination of the true nature of the joint accounts. Because of his own personal claim and the claim of his mother in the accounts, Appellant was hardly in a position to objectively make this determination. His adverse interest disqualified him from acting on behalf of the ward.

Appellant's "frozen account" position is evidence of the degree to which his interests conflict with the interests of the ward. Such a position is based on a theory that is applied or

followed in jurisdictions where the creation of a joint account is either presumed or considered conclusive evidence of the establishment of a right of survivorship in the non-contributing joint tenant. See 62 ALR 2d 1091 Anno.; Joint Depositor - Incompetency - Effect. But in the District of Columbia the decisional law on joint accounts is to the contrary. The presumption is that the account is a convenience account, not an account with an in presenti interest and right of survivorship. Appellant's "frozen account" position is inconsistent with decisional law in the District of Columbia on joint accounts and in advocating such a position Appellant takes a position that favors himself as an individual and as Conservator of the estate of his mother against the interests of the ward, Agnes M. Driscoll. Because of such a real and substantial conflict of interests the Court had no choice but to remove Appellant as Conservator.

Appellant's claims in the joint accounts were not the only conflicts of interests before the District Court. Other undisputed evidence before the Court included evidence that Appellant Hamilton in the 60 day report filed under Rule 22 in the Conservatorship of his mother had reported as an asset of his mother's estate $3,000 that had been given to her by Agnes M. Driscoll on March 4, 1969. Approximately a month later a Conservator was appointed for Agnes M. Driscoll on the verified allegation of

the Appellant that Agnes M. Driscoll was an aged woman nearly eighty years of age who was suffering from senile psychosis with cerebral arteriosclerosis, incapable of transacting business and unable to care for herself. Obviously, a real question was presented as to the donative capacity of the ward to make gifts the month immediately preceding her being found incompetent. Although Appellant in his deposition stated he did not know anything of the circumstances regarding the March 4, 1969, $3,000 gifts to his mother and to Mary Mellot Meyer, acting for his ward, Agnes M. Driscoll, he resolved the question of donative capacity against the interests of his ward and in favor of himself as Conservator of the estate of his mother, Margaret M. Hamilton (Appellant's Deposition, page 71).

Another conflict of interest, the facts of which were undisputed, concerned U.S. Savings Bonds of the total reported value of $2,080, registered in the names of Agnes M. Driscoll and Margaret M. Hamilton. These Bonds were inventoried in the 60 day report filed by Appellant Hamilton in both the Conservatorship of Agnes M. Driscoll and the Conservatorship of Margaret M. Hamilton. Appellant made no attempt to determine whether the Bonds were properly the property of Agnes M. Driscoll or the property of Margaret M. Hamilton, or whether each owned a one-half interest. Rather, Appellant took an equivocal position reporting

the same bonds as assets of both Conservatorships, a position that was evidently dictated by the conflicting interests of Agnes M. Driscoll and Margaret M. Hamilton on the Bonds.

There was other undisputed evidence of conflicting interests as to gifts. Appellant's ward Agnes M. Driscoll was the owner of five parcels of real estate in Virginia, with an estimated value of $250,000. During 1966 and 1967, Agnes M. Driscoll had, without consideration, deeded the five parcels of real estate to Appellant and his wife. Appellant claims that his ward possessed donative intent and these transfers were valid gifts. Other heirs at law here instituted suit to set aside the conveyances on the grounds of lack of donative capacity and undue influence. The institution of this suit and the conflicting claims have resulted in conflict of interests between Appellant and the interests of the ward Agnes M. Driscoll. The Conservator of Agnes M. Driscoll has an obligation to consider the extent to which the Conservator should assist the heirs in their litigation by furnishing such documentary evidence as financial records or other information in his possession. The Conservator has an obligation to consider the extent to which the Conservator should participate in the litigation. Appellant can hardly be expected to fairly make such a determination where his own interests in the property are antagonistic to the interests of his ward.

In summary, the District Court had before it undisputed evidence that the interest of the ward Agnes M. Driscoll were in conflict with the interests of Appellant Hamilton as an individual and as Conservator of the estate of his mother. Under the circumstances, it is submitted that not only did the District Court not abuse its discretion in removing James Hamilton as Conservator, but that it would have been an abuse of discretion for the Court to have failed to order his removal in view of the undisputed evidence of real and substantial conflicts of interest.

CONCLUSION

Appellee, Herbert J. Miller, Jr., Successor Conservator, respectfully urges that the order, decision and actions of the District Court which Appellant James Hamilton has appealed, were not erroneous, nor did the District Court abuse its discretion and, accordingly, the orders of the District Court should be affirmed.

Respectfully submitted,

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By_____

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REPLY BRIEF

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,790

IN RE APPOINTMENT OF

CONSERVATOR FOR

AGNES M. DRISCOLL

JAMES HAMILTON, REMOVED CONSERVATOR,

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Of Counsel:

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UNITED STATES COURT OF APPEALS

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No. 23,790

IN RE APPOINTMENT OF

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REPLY BRIEF

PREFACE

The argument presented by counsel for Otto Meyer that James Hamilton's issues numbers 1 and 3 are improperly presented for review is the type of argument no longer available under the Federal Rules of Appellate Procedure and is incorrect in any event. Otto Meyer has cited only Rule 30(a)(3) as authority. The "Judgment, order or decision" required by that rule is printed in full in the Appendix (62).

Otto Meyer also complains that the Order of the District Court denying James Hamilton's Motion to Set the Petition of Otto Meyer for Hearing on the Civil Non-jury calendar was not mentioned in the Notice of Appeal. Certainly not every ruling of the Court below must be made the subject of a separate Notice of Appeal. In United States v. Pardee, 346 F. 2d 982 (C.A. Md.) the Court said: "Proliferation of notices of appeal is to be discouraged . . . the second notice of appeal . . . is sufficient to raise every question arising from the trial."

Rule 30(a)(b) provides: "In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the Court for reference and examination and should not engage in unnecessary designation." It is submitted that James Hamilton is required to include only the order of removal pursuant to the "Reference to Rulings" requirement which was promulgated July 1, 1968, and which calls for such references as may be "feasible."

The last point made by Otto Meyer is that the action of the District Court in removing James Hamilton as Conservator prior to the expiration of the time granted him to respond to the Supplemental Report of the Guardian Ad Litem is not complained of until the appeal was taken. That action was taken by the District Court in the absence of hearing; the removal was fait accompli and James Hamilton had no chance to object. Rule 46 of the Federal Rules of Civil Procedure specifically provides: ". . . if a party has no

opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

All three of James Hamilton's points on appeal in identical form were served on Otto Meyer with a designation of record for printing in the appendix pursuant to Rule 30(b). Thereafter Otto Meyer had an opportunity to designate any parts of the record he desired to be printed, an opportunity of which he availed himself. Otto Meyer should not now be heard to complain, and he certainly has not been prejudiced, nor does he claim prejudice. The Court has a complete record including transcripts.

REPLY TO OTTO MEYER'S "STATEMENT OF FACTS"

Otto Meyer claims (Br. p.7) that "James Hamilton had taken four distinct and conflicting positions with respect to the "Ferris account." It is to be noted that there is no record citation, rather that Otto Meyer "discovered" this. James Hamilton made a completely candid response to Otto Meyer's Petition (App. 35-41) disclosing all relevant facts about all accounts. The facts of the joint "Ferris account" were completely available. Hamilton petitioned the Court to "freeze" the account except for purposes of support of the ward.

Otto Meyer dwells at length (Br. p. 8-9) on the report of the Dr. John A. Kneipp which is really the precipitating cause of

this litigation. James Hamilton has been tarred (see p. 10, top) repeatedly with the "Kneipp" letter by Otto Meyer and the Guardian Ad Litem although the letter was never offered in Court in the litigation it was obtained for and is "out of Court, not under oath, not sugject to cross-examination." Moreover, the letter was obtained by Otto Meyer from the Guardian Ad Litem who obtained it from Hamilton's former counsel in this proceeding who represented Mrs. Driscoll in Civil Action No. 3245-66 in the United States District Court for the District of Columbia, Jack Diamond t/a Glen Echo Realty v. Agnes M. Driscoll.

Otto Meyer complains (Br. p.10) that it "doubtful" Judge McGuire was completely informed as to the joint accounts. His only caveat is that while the stocks were listed the values were not indicated. The bond was made fully adequate prior to the hearing on James Hamilton's removal (App. 5).

REPLY

Otto Meyer states that he relies chiefly on the following cases: Goldsborough v. Marshall, 100 U.S. App. D.C. 134, 243 F. 2d 240 (1957); Guthrie v. Welch, 24 App. D.C. 562 (1905); and Price v. Williams, 129 U.S. App. D.C. 239, 393 F. 2d 348 (1968). These cases will be treated seriatum:

1. Goldsborough does not pertain to a conservator and was decided under a special statute pertaining to executors, ad-

ministrators, or collectors where provision is made for the removal of one co-executor, co-administrator, or co-collector. "The framers of the statute, evidently recognized that the administration of the estate would be defeated or at least severely hampered if the joint administrators, who should consult, cooperate and join in every act, are antagonistic because of conflicting claims."

The Court continued: "Surely if the Court removes both administrators, with the consent of the complaining one, the purpose of the statute has been served." This language indicates, we submit, that if it had been the case of the removal of one co-administrator at the behest of another, a full trial would have been called for. The Court cited Flaks v. Flaks, 173 Md. 358, 196 A. 116 (1938), a dispute between co-executors, where the Maryland Court stated that the duty of the Orphans Court to make up and transmit issues to a court of law is imperative and that the Court is bound to accept conclusions of jury as final, and to make them effective by proper orders and decrees. The dispute in that case was similar to the present one except no wrongdoing is charged by Otto Meyer. It is true that the Orphans Court has been abolished under Federal Rules, but the jury trial has not, indeed it is specifically reserved (Rule 38, Federal Rules of Civil Procedure, Constitution of the United States, Seventh Amendment). Further, James Hamilton asked only for a non-jury trial.

2. Guthrie v. Welch, as Otto Meyer correctly perceives, relates to collectors, not conservators. The Court carefully

pointed out that summary removal of an administrator or executor could not be made by the District Court. The Court further pointed out that collectors are "in the nature of temporary administrators with more or less limited powers." A Conservator has great powers, is appointed pursuant to statute, and must be "fit" (Section 21-1501, D.C. Code, Appendix I). His reputation is at stake and certainly removal carries a certain stigma and should not be lightly indulged in. Moreover, the Court was on notice that approximately $4000 of James Hamilton's money was involved in the joint "Ferris account" which was in the Conservatorship. (App. 38).

3. Otto Meyer takes exception to James Hamilton's statement that the Conservators were not removed in Price v. Williams though there were obvious conflicts. In that case George Marshall was the majority shareholder of Pro-Football, Inc. Three minority shareholders of Pro-Football, Inc., were appointed Conservators for George Marshall. It is perfectly obvious that the Conservators were in a position to vote themselves salaries and pay legal fees (all are lawyers) and vote dividends. When they voted themselves salaries, etc.,whose interests were they looking out for? Their own minority interest or George Marshall's majority interest? It is not meant to suggest any impropriety but the fact remains the conflicts are obvious.

Otto Meyer has the mistaken idea (Br. p. 16, 19) that the mere existence of a conflict of interest however inconsequential requires removal. The interests of the Ward should always be the

Court's first consideration. 39 C.J.S. Guardian and Ward Section 17. That being so, the Court should be receptive to the framing of issues and hearing a wide range of evidence in a removal proceeding. In Price this Court said, p. 242, "But in the absence of evidence that the ward wishes to sell his stock or that there is a bona fide offer to buy it, the District Court's finding that there is no conflict justifying removal of the conservator (underscoring supplied) is not a clear abuse of discretion." The question really is one of the dimensions of the conflict. The fact that a trustee named in a deed of trust is an officer of the corporate noteholder is not such a conflict to warrant voiding a sale by the trustee. Alpar v. Perpetual Building Association, 104 U.S. App. D.C. 341, 262 F. 2d 230 (1959). See also: Clark v. Trust Co., 100 U.S. 149 (1879). This point need not be labored; other cases are collected in 119 A.L.R. 310 et seq.

The motion and order (along with another order) referred to in James Hamilton's brief from In re Marshall is set forth in Appendix II to this brief. The Court specifically noted that "certain issues of fact have been presented." The action there may be contrasted with the action in James Hamilton's case. Hamilton was given two days to prepare for the hearing on the Motions Calendar!

Otto Meyer states that James Hamilton was given full opportunity to adduce testimony. Not only was he given only two days

to prepare for the Motions Calendar hearing but also he did not see the Guardian Ad Litem's report until minutes before the hearing. Otto Meyer does not deny that the hearing was a Motions Calendar hearing and that procedure, we submit, is legally incorrect. Regarding testimony, see App. 68 where Judge Sirica states:

> "If I think you need to take testimony I will give you some time on that."

The hearing was never adversary in nature. Otto Meyer never put on any witnesses. The only witness heard was Otto Meyer who was placed on the stand at the request of Judge Sirica. That hearing did not present any climate for the presentation of witnesses.

Otto Meyer states (Br. p. 24) that the "confusion of dates is of no consequence whatsoever, in light of the fact that nothing set out in paragraphs 5 and 7(c) of the Supplemental Report of the Guardian Ad Litem had the slightest bearing on the question of conflict of interest." This gets back to Otto Meyer's original misconception that if there is a conflict of interest, ergo, there must be removal. As shown above this is not so.

Notice of the undocketed order of October 10, 1969, was likewise received by counsel for James Hamilton via postcard dated October 16, 1969; it undoubtedly was received on the 17th or 18th. Counsel was directed to submit an order in conformity

with the ruling. If counsel placed the date October 10 on the Order, he would have only two days in which to obtain a doctor to examine Mrs. Driscoll and report to the Court! Surely, that could not be the Court's meaning. Counsel therefore put the date of the postcard October 16 on the proposed Order in an abundance of caution and to lend some certainty to the matter and realizing that if this date was error it could be changed by the Court. Otto Meyer's counsel was furnished with a copy and did not object.

The point is, James Hamilton should have had an opportunity to reply to the Guardian Ad Litem's report and the order in the form it appears in the Appendix (p. 65) was signed by Judge Sirica.

CONCLUSION

> "That does not mean that Mr. Hamilton has not done a good job. In fact, I think that he must have been very close to the ward in this case, from what I gather from the file. She must have a great deal of affection for him."- - - Judge Sirica (App. 90)

What is so wrong with what the District Court has done is that is has not considered Mrs. Driscoll's wishes. James Hamilton lived under the same roof roof with Agnes Driscoll for eight or nine years and has been extremely close many more. The suing relatives were never close to her. Assume it is so, and we say

it is so, that Agnes Driscoll did create the joint "Ferris account" with her nephew and transferred land to her nephew James Hamilton because she wanted him to have absolute title. What has the Court wrought? It has taken the property away from her favorite nephew, delivered it to the Successor Conservator whose interests coincide with those of Otto Meyer! In crude analogy the District Court's action is like that of a General who turns his guns on his won troops. The out-of-town relatives already had a remedy if there was any undue influence and they were energetically pursuing it. This other remedy has been held to qualify the rule with respect to conflict of interest. 119 A.L.R. 310.

The Court also ordered the joint accounts transferred to the Successor Conservator although it had notice that part of the money in the "Ferris account" belonged to James Hamilton (App. 38). The Successor Conservator immediately put the joint accounts in his own name, thereby destroying the joint accounts. He had no right to do this; the law is very clear. But Judge Sirica nor Judge Jones would afford James Hamilton any relief. The District Court has subsequently granted the Successor Conservator the right to intervene in the litigation in Virginia and in this Appeal. Certainly the lower Court could have arrived at a sounder result than this. For one thing it could have held the application of Otto Meyer in abeyance, pending the outcome of the undue influence litigation. It should be noted that James Hamilton has

never discouraged the litigation and has indeed made it easy for Otto Meyer by waiving jurisdiction requirements (See Appendix III).

The Order of the District Court removing James Hamilton as Conservator for Agnes M. Driscoll should be reversed with such directions as the Court deems appropriate.

Respectfully submitted,

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Chapter 15.—CONSERVATORS

Sec.
21–1501. Appointment of conservators.
21–1502. Filing of petition; requirements; time and place of hearing; appointment of guardian ad litem.
21–1503. Bond; powers and duties.
21–1504. Discharge.
21–1505. Appointment of temporary conservator.
21–1506. Personal welfare of person under conservatorship.
21–1507. Lis pendens.

§ 21–1501. Appointment of conservators

When an adult residing in or having property in the District of Columbia is unable, by reason of advanced age, mental weakness not amounting to unsoundness of mind, mental illness, as the latter term is defined by section 21–501, or physical incapacity, properly to care for his property, the United States District Court for the District of Columbia may, upon his petition or the sworn petition of one or more of his relatives or any other person or persons, appoint a fit person to be conservator of his property. (Sept. 14, 1965, 79 Stat. 774, Pub. L. 89–183, § 1, eff. Jan. 1, 1966.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 21–501 (Oct. 24, 1951, ch. 545, § 1, 65 Stat. 608; Sept. 15, 1964, Pub. L. 88–597, § 18, 78 Stat. 953).

Changes are made in phraseology.

NOTES TO DECISIONS UNDER PRIOR LAW

Redemption by conservater

Neither conservator nor his ward must wait for removal of legal disability to redeem property from tax sale, and conservator may not be denied right to redeem in proper case because he is conservator, under District of Columbia statutes. *Shenandoah Corp.* v. *E. F. Jackson* (1962, 298 F. 2d 324, 111 U.S. App. D.C. 410).

§ 21–1502. Filing of petition; requirements; time and place of hearing; appointment of guardian ad litem

(a) Pursuant to the filing of the petition under section 21–1501, the court shall fix a time and place for a hearing; and shall cause at least 14 days' notice thereof to be given to the person for whom a conservator is sought to be appointed, if he is not the petitioner, and to such other persons as the court directs. The petition shall include, among other things—

(1) the reasons for the appointment of a conservator;

(2) the name and address of the person for whom the conservator is sought;

(3) the date and place of his birth, if known; and

(4) the names and addresses of the nearest known heirs at law, or the next of kin, if any.

(b) The court may appoint a disinterested person to act as guardian ad litem in a proceeding under this section. Upon a finding that the person for whom the conservator is sought is incapable of caring for his property, the court shall appoint a conservator who shall have the charge and management of the property of the person subject to the direction of the court. (Sept. 14, 1965, 79 Stat. 774, Pub. L. 89–183, § 1, eff. Jan. 1, 1966.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 21–502 (Oct. 24, 1951, ch. 5.5, § 2, 65 Stat. 608).

Changes are made in phraseology and arrangement.

NOTES TO DECISIONS UNDER PRIOR LAW

Appointment of guardian

Under this section providing for appointment of a guardian ad litem in a proceeding to have a conservator appointed, selection and supervision of guardian ad litem are matters within sound discretion of trial court. *Mazza* v. *Pechacek* (1956, 233 F. 2d 666, 98 U.S. App. D.C. 175).

Selection of private counsel

Person for whose estate appointment of a conservator is sought may select private counsel of his own choice to advocate his position in opposition to appointment of a conservator. *Mazza* v. *Pechacek* (1956, 233 F. 2d 666, 98 U.S. App. D.C. 175).

§ 21–1503. Bond; powers and duties

The conservator before entering upon the discharge of his duties shall execute an undertaking with surety to be approved by the court in such amount as the court orders, conditioned on the faithful performance of his duties as conservator. He shall have control of the estate, real and personal, of the person for whom he has been appointed conservator, with power to collect all debts due the person, and upon authority of the court to adjust and settle all accounts owing by him, and to sue and be sued in his representative capacity. He shall apply such part of the annual income and of the principal of the estate as the court authorizes to the support of the person and the maintenance and education of his family and children; and shall in all other respects perform the same duties and have the same rights and powers with respect to the property of the person as have guardians of the estates of infants. (Sept. 14, 1965, 79 Stat. 775, Pub. L. 89–183, § 1, eff. Jan. 1, 1966.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 21–503 (Oct. 24, 1951, ch. 545, § 3, 65 Stat. 606).

Changes are made in phraseology.

NOTES TO DECISIONS UNDER PRIOR LAW

Compensation

In view of facts that duties of conservator and guardian are basically the same, and that former chapter

5. providing for appointment of conservators was silent as to compensation of conservators and merely provided that conservators should have same rights and powers as guardians and that court should have the same powers with respect to property of any person for whom conservator had been appointed as it had with respect to property of infants under guardianships, compensation of conservator should be fixed under former § 21–126 limiting compensation of guardians to fixed percentage of amounts actually collected if and when disbursed. *In re Searle* (D.C.D.C. 1954, 118 F. Supp. 273).

Evidence as to personal liability

Because agreement between landlords and conservator of estate of tenant to pay increased rent for premises occupied by tenant was oral, evidence was admissible to show understanding of parties as to whether conservator was to be bound personally by agreement. *W. E. Summerbell et ano. v. W. B. McDonnell, individually etc.* (D.C. App. 1964, 197 A. 2d 150).

Evidence supported trial court's finding that landlords and conservator of tenant's estate who had orally agreed to pay increased rent for premises occupied by tenant did not intend to bind conservator in his individual capacity. *Id.*

Redemption by conservator

Neither conservator nor his ward must wait for removal of legal disability to redeem property from tax sale, and conservator may not be denied right to redeem in proper case because he is conservator, under District of Columbia statutes. *Shenandoah Corp. v. E. F. Jackson* (1962, 298 F. 2d 324, 111 U.S. App. D.C. 410).

§ 21–1504. Discharge

When a person for whom a conservator has been appointed under this chapter becomes competent to manage his property, he may apply to the court to have the conservator discharged and to be restored ' the care and control of his property. If the court nds him to be competent, it shall enter an order restoring the care and control of his property to him. The court has the same powers with respect to the property of a person for whom a conservator has been appointed as it has with the[1] respect to the property of infants under guardianships. (Sept. 14, 1965, 79 Stat. 775, Pub. L. 89–183, § 1, eff. Jan. 1, 1966.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 21–504 (Oct. 24, 1951, ch. 545, § 4, 65 Stat. 608).
Changes are made in phraseology.

§ 21–1505. Appointment of temporary conservator

Upon the filing of a petition as provided by this chapter, the court may, with or without notice or hearing, appoint a temporary conservator of the estate of a person, if it deems the action necessary for the protection of the estate, subject to the provisions for an undertaking specified by section 21–1503. The temporary conservator shall serve only until a permanent conservator can be appointed or until sooner discharged. (Sept. 14, 1965, 79 Stat. 775, Pub. L. 89–183, § 1, eff. Jan. 1, 1966.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 21–505 (Oct. 24, 1951, ch. 545, § 5, 65 Stat. 608).
Changes are made in phraseology.

NOTES TO DECISIONS UNDER PRIOR LAW

Compensation of temporary conservator

Compensation of temporary conservator would not be determined under former § 21–126 fixing compensation of guardian but would be determined by considering the character of services rendered, the size of the estate, and the compensation awarded guardian ad litem and attorney for the guardian. *In re Searle* (D.C.D.C. 1954, 118 F. Supp. 273).

§ 21–1506. Personal welfare of person under conservatorship

The court may at any time order that the conservator or another person shall be responsible for the personal welfare of the person whose property is under conservatorship. In that event the conservator or other person, subject to the direction and control of the Civil Division of the court, has the same powers and duties with respect to the personal welfare of the person whose property is under conservatorship as have the guardians of the persons or infants under guardianships. (Sept. 14, 1965, 79 Stat. 775, Pub. L. 89–183, § 1, eff. Jan. 1, 1966.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 21–506 (Oct. 24, 1951, ch. 545, § 6, 65 Stat. 609).
Changes are made in phraseology.

§ 21–1507. Lis pendens

Upon the filing of a petition under this chapter, a certified copy of the petition may be filed for record in the office of the Recorder of Deeds of the District of Columbia. If a conservator is appointed on the petition, all contracts, except for necessaries, and all transfers of real and personal property made by the ward after the filing and before the termination of the conservatorship are void. (Sept. 14, 1965, 79 Stat. 775, Pub. L. 89–183, § 1, eff. Jan. 1, 1966.)

REVISION NOTES

Based on D.C. Code, 1961 ed., § 21–507 (Oct. 24, 1951, ch. 545, § 7, 65 Stat. 609).
Changes are made in phraseology.

App. I, p. 2

[1] So in original.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re:]

Appointment of a Conservator for] Civil Action No. 2979-63

GEORGE P. MARSHALL]

MOTION TO SET FOR HEARING TO TAKE EVIDENCE AS IN EQUITY AND FOR ORAL ARGUMENT

Comes now Milton W. King, C. Leo DeOrsey and Edward Bennett Williams, Temporary Conservators, by their attorneys, King & Nordlinger, and move that the Court set the above-entitled cause for hearing to take evidence and oral argument thereon as in equity for the following reasons:

1. It appears from the record of the above-entitled cause that issues of fact have developed herein.

2. Without the taking of evidence and the findings of facts to be based thereon, an argument of the applicable law cannot appropriately be made.

3. And for other reasons to be made apparent at the hearing hereof.

KING & NORDLINGER

By _____
Bernard I. Nordlinger
419 Southern Building
Washington 5, D. C.
Attorneys for Temporary
Conservators

KING & NORDLINGER
SOUTHERN BUILDING
WASHINGTON 5, D. C.

NOTICE

To: George Summers, Esquire
1625 K Street, N. W.
Washington 6, D. C.
Attorney for Mrs. Catherine Marshall Price and George P. Marshall, Jr.

John J. Carmody, Esquire
Guardian ad litem
815 15th Street, N. W.
Washington 5, D. C.

Please take notice that the above-entitled Motion will be called to the attention of one of the Judges of the above-entitled Court at such time as you may be advised by the Motions Clerk. The rules of the above-entitled Court require that you answer the foregoing Motion within five (5) days or the Court may treat the Motion as conceded.

KING & NORDLINGER

By _____
Bernard I. Nordlinger
419 Southern Building
Washington 5, D. C.
Attorneys for Temporary Conservators

CERTIFICATE OF SERVICE

I hereby certify I mailed a copy of the foregoing Motion, Notice and Points and Authorities in Support thereof to George C. Summers, Esq., 1625 K Street, N. W., Washington 6, D. C., attorney for Mrs. Catherine Marshall Price and George P. Marshall, Jr., and to John J. Carmody, Esq., Guardian ad litem, 815 15th Street, N.W., Washington 5, D. C., postage prepaid, this 1st day of February, 1964.

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_____
Bernard I. Nordlinger

FILED

FEB 17 1964

HARRY M. [illegible], CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re:]

Appointment of a Conservator for] Civil Action No. 2979-63

GEORGE P. MARSHALL]

ORDER GRANTING MOTION FOR HEARING, SETTING DATE FOR HEARING, CONTINUING CERTAIN MOTIONS FOR HEARING

Upon consideration of the Motion of MILTON W. KING, C. LEO DeORSEY and EDWARD BENNETT WILLIAMS, Temporary Conservators to Set for Hearing to Take Evidence As in Equity and the Points and Authorities in support thereof and the opposition thereto of Catherine Marshall Price and George P. Marshall, Jr., and upon oral argument thereon in open Court on the 13th day of February, 1964, by counsel for the respective persons heretofore mentioned, and upon hearing John J. Carmody, Esquire, Guardian ad litem, heretofore appointed herein, and it appearing to the satisfaction of the Court that certain issues of fact have been presented by the opposition of Catherine Marshall Price and George P. Marshall Jr. to the appointment of the Temporary Conservators as permanent and it further appearing to the satisfaction of the Court that other Motions and Petitions as hereinafter set forth, are not appropriate for resolution in view of the action hereafter taken by the Court in respect of Motion to Set for Hearing, it is by the Court this 17th day of February, 1964,

ORDERED, that the Motion of the Temporary Conservators to Set for Hearing to Take Evidence As in Equity be, and the same hereby is granted and the date for hearing be, and the same hereby is, set for May 5, 1964, without a jury.

N.

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FURTHER ORDERED, that the Motion of the Temporary Conservators for a Protective Order to Bar Contents of Testamentary Documents from Public Scrutiny be, and the same hereby is, continued for determination by the Judge conducting the hearing heretofore ordered.

FURTHER ORDERED, that the Motion of the Temporary Conservators for Extension of Time Within Which to File Briefs be, and the same hereby is continued for determination by the trial Judge heretofore mentioned.

FURTHER ORDERED, that the Petition and Cross Petition of Catherine Marshall Price and George P. Marshall, Jr. for Appointment of Conservators of the Person and Estate of George P. Marshall, Sr. be, and the same hereby are continued for determination by the trial Judge heretofore mentioned.

FURTHER ORDERED, that the foregoing shall be without prejudice to the right of Catherine Marshall Price and George P. Marshall, Jr. to file a Motion to advance for hearing the question whether or not the Temporary Conservators are disqualified as a matter of law from serving as such.

Seen:

JUDGE

John J. Carmody, Guardian ad litem

George C. Summers, Attorney for
Catherine Marshall Price and
George P. Marshall, Jr.

KING & NORDLINGER

By
Bernard I. Nordlinger,
Attorneys for Temporary
Conservators

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P. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re:]

Appointment of a Conservator for] Civil Action No. 2979-63

GEORGE P. MARSHALL]

FILED

JUN 15 1964

HARRY M. HULL, CLERK

ORDER CERTIFYING AS READY FOR TRIAL AND ADVANCING FOR TRIAL AND FOR OTHER PURPOSES

Upon consideration of the Motion of Catherine M. Price and George P. Marshall, Jr. for a Medical Examination and the Statement of Temporary Conservators in Response Thereto, the Affidavit of John J. Carmody, Esquire, guardian ad litem, the Opposition by the guardian ad litem to the Motion for a Physical Examination, the Response of Catherine M. Price and George P. Marshall, Jr. to the Opposition by the guardian ad litem, and upon oral hearing thereon in open Court on the 3rd day of June, 1964, and upon oral application for an order to remove the above-entitled cause from hearing in Motions Court and to have the same set for hearing and advanced for trial on the civil non-jury calendar of this Court, and the Motion for Medical Examination having heretofore been denied without prejudice, it is by the Court this 15th day of June, 1964,

ORDERED, that the above-entitled cause be, and the same hereby is removed from the Motions Calendar of this Court and is certified as ready for trial on the civil non-jury calendar.

FURTHER ORDERED, that the above-entitled cause be, and the same hereby is advanced for trial to October, 1964, with leave granted to all interested parties to conduct discovery proceedings until September 15, 1964.

AC/N
N

KING & NORDLINGER
SOUTHERN BUILDING
WASHINGTON 5, D. C.

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FURTHER ORDERED, that all Motions and Petitions pending herein as of this date be, and the same hereby are continued for hearing and for determination by the Judge of this Court who shall conduct the trial hereof as heretofore ordered.

JUDGE

NOTICE

To: John J. Carmody, Esquire
Bowen Building
Guardian ad litem
Washington, D. C.

George C. Summers, Esquire
1625 K Street, N. W.
Washington, D. C.

Please take notice that the foregoing Order will be presented to the Honorable George L. Hart, District Judge, as a preliminary matter at 10:00 o'clock in the morning on June 12, 1964, Court House, Washington, D. C.

KING & NORDLINGER

By Bernard I. Nordlinger

Bernard I. Nordlinger
419 Southern Building
Washington, D. C.
Attorneys for Temporary Conservators

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Order and Notice was made by mailing a copy thereof, postage prepaid, to John J. Carmody, Guardian ad litem for George P. Marshall, Bowen Building, Washington, D. C., and to George C. Summers, Esquire, attorney for George P. Marshall, Jr. and Catherine M. Price, 1625 K Street, N. W., Washington, D. C., this 4th day of June, 1964.

Bernard I. Nordlinger

KING & NORDLINGER
SOUTHERN BUILDING
WASHINGTON 5, D. C.

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

OTTO MEYER, et al	)	
Complainants	)	
vs	)	IN CHANCERY NO. 29842
JAMES R. HAMILTON NANCY E. HAMILTON	)	STIPULATION
Defendants	)	

IT IS AGREED by counsel hereto and by the defendants individually, as indicated by their signatures appearing hereinbelow, that the following stipulations are made with respect to this action:

It is hereby agreed that the Defendants and each of them, upon addition of Agnes M. Dri-coll by Next Friends, Otto Meyer and Roger E. Sanders, as Party Complainant, shall not file any motion or demurrer or other responsive pleading to question the standing of the Complainants to file and prosecute this cause or challenging the general jurisdiction of the Fairfax County Circuit Court to hear and decide the issues raised by the Bill of Complaint and Amended Bill of Complaint herein.

It is hereby further agreed that all parties shall abide by the ultimate decision of the Courts of Virginia on each and every question raised by the pleadings.

It is hereby further agreed that the Defendants and each of them forever waive any right of appeal to the Supreme Court of Appeals, Richmond, Virginia, based on a claim that the Complainants lack standing to sue, or that this cause is without the jurisdiction of the Fairfax County Circuit Court.

It is hereby further agreed that in the event it should be determined by this Court that any, some or all of the deeds which alienated the properties referred to in this action to the Defendants are voidable, the Defendants and each of them will comply with any direction of the Court designed to correctly establish record title to the real estate described in said deed or

All parties hereto stipulate that they ask the Court to enter that certain Order, copy of which is attached hereto; and it is hereby further agreed that the Defendants and each of them waive any right which they may possibly have to object to Otto Meyer and Roger E. Sanders appearing herein as Next Friends of Agnes M. Driscoll, and prosecuting this action on behalf of Agnes M. Driscoll, and that the Defendants and each of them further waive any right which they may possibly have to object to the prosecution of this action on behalf of Agnes M. Driscoll by her Next Friends without a judicial finding of incompetency.

Date: Nov. 10, 1969 — James R. Hamilton
James R. Hamilton, Defendant

Date: Nov 10, 1969 — Nancy E. Hamilton
Nancy E. Hamilton, Defendant

BERRYMAN, SMITH AND SANDERS

Date: November 17 1969 — By /s/Roger E.Sanders
Roger E. Sanders
Counsel for Complainants

WILLIAM B. WOLF, JR.

Date: November 17 1969 — /s/ William B.Wolf, Jr.
Counsel for Complainants

McCANDLISH, LILLARD AND MARSH

Date: Nov. 10, 1969 — By R. J. Lillard
R. J. Lillard
Counsel for Defendants

James J. Alexander

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